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No. 93-____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ORIGINAL

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RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

80 pp

QUESTIONS PRESENTED

I. WHETHER THE REFUSAL TO ALLOW PETITIONER'S CAPITAL SENTENCING JURY TO CONSIDER, AS MITIGATION, EVIDENCE IT HEARD OF A LIFE SENTENCE IMPOSED ON HIM IN VIRGINIA FOR ANOTHER MURDER THAT WAS FOUND AS AN AGGRAVATING FACTOR AND ARGUED AS EVIDENCE OF PETITIONER'S FUTURE DANGEROUSNESS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS?

II. WHETHER THE TRIAL COURT'S DIRECTIVE FOR PETITIONER'S ANNOUNCED "HUNG" JURY TO RESUME DELIBERATIONS IN AN EFFORT TO RENDER A SENTENCING RECOMMENDATION, WITHOUT ASSURING THE JURY IT COULD FAIL TO AGREE ON A UNANIMOUS RECOMMENDATION, RISKED A COERCED SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AMENDMENT?

III. WHETHER AN APPELLATE COURT MAY EVER DISREGARD AS HARMLESS A JURY INSTRUCTION ALREADY FOUND UNCONSTITUTIONAL BY THIS COURT, MCKOY V. NORTH CAROLINA, THAT IMPERMISSIBLY LIMITS THE ABILITIES OF INDIVIDUAL JURORS TO GIVE EFFECT TO MITIGATING EVIDENCE IN A CAPITAL CASE, WHERE SUCH ERROR IS SO FUNDAMENTAL TO THE VALIDITY AND RELIABILITY OF THE CAPITAL SENTENCING PROCESS AND WHERE NO RELIABLE EXTRINSIC EVIDENCE SHOWS THE ERROR HARMLESS BEYOND A REASONABLE DOUBT?

IV. WHETHER THE LOWER COURT APPLIED AN IMPROPER HARMLESS ERROR ANALYSIS TO THE UNCONSTITUTIONAL JURY SELECTION PROCESS THAT VIOLATED MORGAN V. ILLINOIS WHEN IT RELIED ON INQUIRIES OF PROSPECTIVE JURORS THAT WERE IDENTICAL TO THOSE INQUIRIES FOUND TO BE CONSTITUTIONALLY DEFICIENT IN MORGAN ITSELF, IN VIOLATION OF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY?

V. WHETHER THE PROSECUTOR'S USE OF PETITIONER'S FAILURE PERSONALLY TO EXPRESS AND PURPORTED ABSENCE OF REMORSE AT TRIAL AND SENTENCING, ARISING SOLELY FROM HIS UNWILLINGNESS TO ADMIT GUILT TO THE JURY, RENDERED THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AMENDMENT?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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Petitioner, Ricky Lee Price, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered on 27 February 1990, as reaffirmed and reinstated after remand on 15 July 1992, as reaffirmed and reinstated after further remand on 30 September 1993.

OPINIONS BELOW

The first opinion of the Supreme Court of North Carolina is officially reported at 326 N.C. 56, 388 S.E.2d 84 (1990), and is reproduced in the Appendix. [App. 1-27] The second opinion of the Supreme Court of North Carolina is officially reported at 331 N.C. 620, 418 S.E.2d 169 (1992), and is reproduced in the Appendix. [App. 30-39] The third opinion of the Suprme Court of North Carolina is officially reported at 334 N.C. 615, 433 S.E.2d 746 (1993), and is reproduced in the Appendix. [App. 42-44]

JURISDICTION

The original judgment of the Supreme Court of North Carolina affirming petitioner's conviction and sentence was entered on 27 February 1990. [App. 28] This Court, on 1 October 1990, vacated that judgment and remanded the case for reconsideration in light of McKoy v. North Carolina, 494 U.S. 433 (1990). After firther briefing and oral argument, the judgment of the Supreme Court of North Carolina, affirming petitioner's conviction and sentence, was reinstated on 15 July 1992. [App. 40] This Court, on 11 January 1993, vacated that judgment and remanded the case for reconsideration in light of Morgan v. Illinois, 504 U.S. ___, 199 L.Ed.2d 492 (1992).

[App. 41] After further briefing and oral argument, the judgment of the Supreme Court of North Carolina, affirming petitioner's conviction and sentence, was reinstated on 30 September 1993.[1] [App. 45] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a) (1988).

This Court has twice remanded this case for reconsideration by the lower court. On both occasions, the lower court has reconsidered its earlier judgments, found that federal constitutional error occurred in at least two instances during petitioner's capital trial and sentencing hearings, yet concluded that such errors were harmless. This Court must now consider the propriety of these analyses, particularly in light of the recent determination restricting the ability of subsequent reviewing courts to engage in a harmless error review of federal constitutional error to determine if such error is, in fact, harmless beyond a reasonable doubt, as required by Chapman v. California, 386 U.S. 18 (1967). See Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353 (1993). Given the lower court's failure to apply the rigorous Chapman analysis to acknowledged federal constitutional error in petitioner's case, remand for reconsideration in light of Brecht is in order.

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[1]The first opinion of the Supreme Court of North Carolina was filed on 7 February 1990. The second opinion of that court was filed on 25 June 1992. The third opinion of that court was filed on 10 September 1993. The actual judgment of the Supreme Court of North Carolina is entered on the docket by the clerk twenty (20) days after the date an opinion is filed. **N.C. App. P. 32(b).**

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const., amend. VI: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ...

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV: No state shall ... deprive any person of life, liberty, or property, without due process of law ....

N.C. Gen. Stat. §15A-2000(b):[2] ... After hearing the evidence, argument of

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[2]N.C. Gen. Stat. §15A-2000 is reproduced in the Appendix. [App. 46-47]

counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exists; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist, and (3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors . . . .

N.C. Gen. Stat. §15A-2000(f): Mitigating Circumstances. Mitigating circumstances which may be considered shall include, but not be limited to, the following:

> . . .
>
> (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
>
> . . .
>
> (9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

STATEMENT OF THE CASE

This case presents several fundamental questions of federal constitutional import. Each is worthy of review by this Court due to its significance to the capital punishment jurisprudence of North Carolina and other states. Additionally, this case deserves especial attention because the lower court has twice refused, on reconsideration ordered by this Court, to afford petitioner the full panoply of federal constitutional guarantees to which he is entitled. These refusals by the lower court have exhibited a disregard for the intervening and controlling decisions of this Court.

These important federal constitutional questions include:

1. Whether a trial court in a capital sentencing hearing may refuse to instruct the sentencing jury to consider mitigating evidence supported by the evidence, when that evidence is the punishment imposed--a life sentence--for another murder committed as part of the same course of conduct as the crime for which petitioner is being sentenced, when the sentencing jury relied on that other murder as an aggravating circumstance in the case at bar? The prosecutor argued petitioner's future dangerousness based upon the other murder and the sentencing jury heard considerable testimony about it. Petitioner had no mechanism for having his jury consider the punishment imposed for that murder as mitigation, in violation of the Eighth

Amendment, as explained in Lockett v. Ohio, 438 U.S. 586 (1978), and Penry v. Lynaugh, 492 U.S. 302 (1989). Additionally, petitioner had no opportunity to rebut the aggravating nature of the prior murder, used as an aggravating circumstance, with the evidence of the life sentence imposed for it, in violation of his Fourteenth Amendment right to due process of law, as explained in Gardner v. Florida, 430 U.S. 349 (1977).

2. Whether the trial court unfairly coerced a sentencing recommendation from the sentencing jury after the jury announced it was "hung" as to the appropriate sentencing decision, when it gave supplemental instructions that failed to assure the jury it could simply report its inability to reach a sentencing recommendation to the trial court? This issue presents the important Eighth and Fourteenth Amendment question left open by this Court in Lowenfield v. Phelps, 484 U.S. 231 (1988), where the supplemental instructions expressly told the sentencing jury that a life sentence would be imposed if it failed to reach a unanimous sentencing decision. The instructions given to petitioner's sentencing jury had no such saving language.

3. When, if ever, may an appellate court disregard as harmless error a jury instruction, already found by this Court to be unconstitutional, McKoy v. North Carolina, 494 U.S. 433 (1990), that impermissibly limits the ability of individual jurors to

consider and give effect to mitigating evidence in the sentencing phase of a capital case? This important question was left unanswered in McKoy and has never been addressed by this Court. Furthermore, the quality of a harmless error determination by a lower court on direct review of a capital trial marred by federal constitutional error must be vigorously scrutinized in light of the more lenient standard governing review of federal constitutional claims in habeas corpus after Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353 (1993). Indeed, this case presents an opportunity for this Court to explicate the appropriate analysis required to find federal constitutional error "harmless beyond a reasonable doubt" on direct appeal in light of Brecht.

4. When, if ever, may an appellate court find a violation of Morgan v. Illinois, 504 U.S. ___, 119 L.Ed.2d 492 (1992), harmless beyond a reasonable doubt when such a violation occurred in the jury selection of petitioner's capital trial and several veniremembers served as jurors and sentenced petitioner to death without him being able to ask them if they could fairly consider life as a possible sentence in his case? The lower court, on remand from this Court in light of Morgan, acknowledged error under Morgan occurred in the selection of petitioner's capital jury. Its finding that this federal constitutional error was "harmless beyond a reasonable doubt" because the trial court explained the North Carolina

capital sentencing process to prospective jurors and then allowed petitioner to inquire if these prospective jurors could follow those instructions cannot render a violation of basic federal constitutional provisions harmless. Such a holding is squarely at odds with Morgan itself. Thus, the lower court failed to follow this Court's directive to reconsider its judgment in light of Morgan.

5. When petitioner relies on the presumption of innocence and exercises his federal and state constitutional rights not to testify at either phase of his capital trial, may the prosecutor argue the absence of petitioner's remorse as a reason for the jury to sentence him to die? This argument infringes on the important right not to testify. The manner in which the argument was made against petitioner amounted to an impermissible comment on his failure to testify, which violated the spirit if not the letter of Griffin v. California, 380 U.S. 609 (1965).

A. Procedural Developments.

Petitioner was indicted on a charge of first degree murder. After a jury trial, he was convicted of murder in the first degree. After a separate sentencing hearing, the same jury recommended that petitioner be sentenced to death and the presiding judge imposed a sentence of death. Petitioner appealed and the judgment was stayed. The Supreme Court of North Carolina affirmed the conviction and sentence. State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990). This Court issued a writ of certiorari, vacated the judgment, and remanded the case for further consideration. Price v North Carolina, 498 U.S. 802 (1990). On remand, the Supreme Court of North Carolina reaffirmed and reinstated its judgment. State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992). This Court again issued a writ of certiorari, vacated the judgment, and remanded the case for further consideration. Price v. North Carolina, 113 S.Ct. 955 (1993). On remand, the Supreme Court of North Carolina reaffirmed and reinstated its judgment. On both remands, the lower court found the federal constitutional errors perceived by this Court harmless. It did not find either of the intervening decisions inapplicable to the facts of petitioner's capital trial and sentencing hearing.

B. Factual Background.

On the Sunday morning of 21 October 1984, Anne and Tony Wrenn were walking their son, Bryant, along a wooded area. They saw a man, crouching near the ground. He picked up something and began to run. The Wrenns then noticed a woman on the ground where the man had crouched. Anne Wrenn went to obtain assistance or help, while Tony Wrenn chased the man with his son's nanchaku. Both Anne and Tony Wrenn identified petitioner as the man they saw in the woods.

Dr. Thomas Long, a medical examiner, examined the woman's body found by the Wrenns. The victim was dead. Dr. Robert L. Thompson, a forensic pathologist, conducted an autopsy and concluded the victim, Brenda Leigh Smith, died of a ligature strangulation. An object had been placed around her neck and pulled in such a fashion that blood would not go to her brain.

Brenda Smith, who lived with her parents at the time of her death, was dating petitioner. According to her mother, petitioner telephoned Brenda on 29 October 1984

and came over to visit her. Brenda and petitioner left for Greensboro, driving two cars. According to her mother and father, Brenda telephoned them the next day at approximately 8:45 a.m. Her father took the collect call. They talked for fifteen to twenty minutes. The Smith's telephone bill showed a collect call from a telephone number, dated 21 October 1984. This number was for a telephone at a gasoline station approximately twenty-two miles from the place where Brenda Smith's body was found.

Elaine Clay met petitioner at a night club in Danville, Virginia in October 1984. When she came home from work on Thursday before the weekend in question, petitioner was mowing her yard. He told Clay he wanted to move in with her, in part to get away from Joan Brady. Clay agreed to allow petitioner to leave one set of clothes at her house. Instead, he left.

Janice Bates lived with petitioner in Danville from June 1983 to September 1984. She claimed she heard his voice on 22 October 1984 between midnight and 2:30 a.m. outside her trailer. The next morning, she noticed some window screens had been removed on the outside of her trailer.

On the evening of 22 October 1984, Darryl Gammon went to his uncle's house in Danville, Virginia. Gammon heard voices from downstairs and he found James Hardy with his hands tied behind him and a rag in his mouth. Petitioner was behind a curtain with a flashlight and a knife. Gammon attempted to restrain petitioner with a gun, but he pulled a knife on his cousin. While holding a knife to Tony Irwin's throat, petitioner made Gammon give him the gun. Petitioner held police officers at bay for approximately five and one-half hours before they managed to arrest him. They seized Brenda Smith's class ring from petitioner along with a key ring with the words "Certified Crazy Person" engraved on it. Brenda Smith's sister identified the rings and key chain taken from petitioner as belonging to the victim.

Susan Pyron testified that her sister, Joan Brady, had been killed on 19 October 1984. She identified a photograph of her sister's body that showed her face down on the bed with her hands tied behind her back with shoe strings and a handkerchief tied tightly around her neck. Joan Brady died of a ligature strangulation.

Jerald Inman, who had been incarcerated with petitioner in the Danville jail, reiterated that petitioner admitted killing Brenda Smith and Joan Brady. According to Inman, petitioner had been dating too many people. Things had begun building up on him. He felt he had to eliminate somebody.

C. **Penalty-Phase Evidence.**

During the early morning hours of 22 October 1984, Elaine Clay was awakened by the sound of her smoke detector. She and her nine-year old son noticed smoke coming from under the basement door. They left the house and neither was injured. The fire marshall visited the Clay house. In his opinion, he felt the fire was intentionally set. Detective Tom Brown was present at the Hardy house and heard petitioner say a friend of his had burned Elaine Clay's house. Detective Buddy Holley, however, claimed petitioner said he had burned Elaine Clay's house and she "got what she deserved."

The state introduced a judgment from Virginia indicating petitioner had been convicted of murdering Joan Brady and received a life sentence. Holley testified that Joan Brady was the victim in that case.

Cleo Price, petitioner's mother, gave a vivid description of his childhood. About the time he turned fourteen, he began to exhibit signs of anger and high emotions. When he encountered legal difficulties, he was housed and treated at Dorothea Dix

Hospital, a state psychiatric and mental health facility, for six to eight weeks and then transferred to Butner, a similar federal facility, for seven or eight additional months. After he was hospitalized at Butner, petitioner seemed to be much better and was under more control. Nevertheless, his mental health problems continued. He was hospitalized at Butner three additional times before he reached the age of eighteen. Additionally, petitioner was hospitalized at Southwestern State Hospital in Marion, Virginia for seven or eight months when he was eighteen.

His mother also revealed a long history of psychological and psychiatric problems in her family. She had been hospitalized herself for four or five months for psychological problems when petitioner was five years old. She related instances of her hospitalization for mental and emotional problems in 1980 and 1986. Indeed, she was still under psychiatric care at the time of petitioner's trial.

She further explained that her sister and brother had psychiatric problems. A history of mental disorders ran in her family on her father's side. Her sister had been hospitalized for emotional problems on two occasions and her brother had similar in-patient treatment on one occasion. Her cousin had also been hospitalized on four or five occasions for psychiatric reasons.

Petitioner testified that his life was relatively uneventful during his early years, including his time in elementary school. After he reached the seventh grade, he began "hanging around with [people who] smoked dope and different things." He was first placed in a mental institution when he was "about fifteen years old." He recalled being sent to Dorothea Dix Hospital, placed in a management ward, and strapped to a bed. He spent at least sixteen months at Dix during that initial stay. After this commitment, he was hospitalized at both John Umstead Hospital and Butner. Each of these commitments lasted at least four to six months. He was nineteen at the time of his final

hospitalization at Butner. His final hospitalization was caused by using acid or LSD.

He related that he had received a fifty-year prison sentence for the hostage situation at the Hardy residence. He denied killing Brenda Smith and Joan Brady.

Michael Dennis Hancock, who knew petitioner well, saw him the night after Joan Brady was killed. Petitioner's "eyes didn't look right" and Hancock felt he was under the influence of drugs.

Dr. Arthur Centor, a forensic psychologist, testified regarding his evaluation of petitioner. Dr. Centor explained that petitioner had been committed civilly to mental hospitals on several occasions. During an early commitment to Southwestern State Hospital, petitioner was hospitalized from 12 January 1978 to 1 June 1978. He was diagnosed as having a manic-depressive illness, which Dr. Centor described as serious. According to the medical records, during this commitment petitioner denied that he was Ricky Price. He indicated his named was Carlos Rodriguez. He denied, however, having false perceptions. These reports concluded that petitioner showed "evidence of severe thought disturbances and that some of his utterances were apparently delusional, that is, having a false belief, and that his affect or emotions . . . appeared to be manic in character, manic meaning elated, up as opposed to depressed." The report concluded he was not malingering.

Dr. Centor found petitioner functioned at the borderline level of intelligence with an I.Q. between 70 and 79. Dr. Centor felt he was "closer to mental retardation." A person of that intellectual functioning would have a more difficult time faking or malingering on psychological tests.

During an admission at John Umstead Hospital in 1974, petitioner was diagnosed as being a paranoid schizophrenic. This diagnosis involved petitioner having

a thought disorder of a type that contained delusions and paranoia, thoughts that "people were against him or trying to hurt him or something of that type. Paranoia being abnormal thinking." At the subsequent admission in 1975, doctors reached the same diagnosis. Dr. Centor explained that "schizophrenia is a condition which is not organic. It comes from the life of the individual, the stresses, strains of living, the inability almost to cope with life, to deal with life." The continual use of drugs can cause the development of a mental disorder. One could even have a major episode involving a mental disorder from ingesting just a moderate amount of drugs, especially acid or LSD. An episode might last as long as four to six weeks. During his 1975 institutionalizations, doctors continued petitioner on psychotropic medication. They also found no indication of malingering.

Dr. Centor also relied upon records from a 1977 admission to John Umstead Hospital. These records indicated this admission was petitioner's fifth commitment to that institution. It was an involuntary commitment. The records revealed petitioner had "a history of recurring psychotic behavior and was overactive, agitated, hostile, threatening, and had been in several fights resulting in bodily injuries to others." Dr. Center explained that psychotic behavior was "the extreme form of mental illness which is more than neurosis and neurotic." The reports again contained no suggestion of malingering.

On cross-examination Dr. Center explained that he felt petitioner was faking his condition to try and avoid a death sentence. Part of the hospital records indicated a statement by petitioner to that effect.

Dr. Selwyn Rose, a forensic pathologist, explained petitioner had an enormous history of mental illness. Every doctor who had treated petitioner prescribed strong anti-psychotic medications. Petitioner suffered from "personality disturbances which

[were] quite profound." He had poor impulse control which, combined with his limited mental state, created "a very serious group of mental illnesses, which [defendant] has and has had probably since he was a child."

Dr. Rose felt petitioner's mental condition would have impaired his ability to make judgments and control impulses in October 1984. His drug abuse, combined with his mental illness and limited intellectual capacity, completely distorted his thinking. They combined to impair his ability to make judgments, rational decisions, and control his impulses. Petitioner suffered from a very impaired control system due to his mental illness and drug abuse.

Janice Bates told the jury she had lived with petitioner for a period of time until September 1984. She believed that he was taking drugs during this period of time. She saw him a week before Joan Brady was killed and noticed that he was acting very differently from when he was merely drinking.

Dr. Brad Fisher, a clinical forensic psychologist, concluded petitioner suffered from a major mental illness. One of the strong indications of the seriousness of petitioner's mental condition was the level and consistency of medication with psychotropic drugs. Dr. Fisher also relied upon the history of mental illness in petitioner's family. In his opinion, petitioner suffered from a serious mental illness in October 1984 that would have impaired his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

Jerald Inman testified as a rebuttal witness for the state. He related that petitioner had told him he had "to go the insanity route" as it was his only opportunity to escape. He felt it was necessary for him to convince the courts that he was crazy. In Inman's opinion, he saw nothing wrong with him from November 1984 to January 1985.

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

Each of the questions raised in this petition were presented to the Supreme Court of North Carolina based upon violations of specific federal constitutional provisions. The court rejected each claim on the merits.[3] Thus, each federal constitutional claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally Mullaney v. Wilbur*, 421 U.S. 684 (1975).

I. THE REFUSAL TO ALLOW PETITIONER'S CAPITAL SENTENCING JURY TO CONSIDER, AS MITIGATION, EVIDENCE IT HEARD OF A LIFE SENTENCE IMPOSED ON HIM IN VIRGINIA FOR A MURDER THAT WAS USED AS AGGRAVATION VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner timely sought to have the trial court instruct the sentencing jury that it could consider, as mitigation, evidence of the life sentence he received for the murder of Joan Brady -- a murder about which the prosecution offered considerable evidence and which the jury eventually found as an aggravating factor. The trial court denied petitioner's request. In affirming this action, the Supreme Court of North Carolina declared this life sentence "is not a circumstance which tends to justify a sentence less than death" and is "irrelevant" to the capital sentencing decision. [App. 38] *State v. Price*, 331 N.C. 620, 634-45, 418 S.E.2d 169, 177 (1992). This decision is wholly at odds with this Court's settled jurisprudence. *E.g., Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978);

[3] Although the state argued some of these claims were procedurally barred, the court below explicitly declined to foreclose consideration of each claim on its merits and resolved each federal constitutional claim raised herein on the merits. *State v. Price*, 331 N.C. 620, 630, 418 S.E.2d 169, 174-75 (1992); *State v. Price*, 326 N.C. 56, 87, 388 S.E.2d 84, 102, *vacated and remanded*, 494 U.S. ___, 112 L.Ed.2d 7 (1990).

see also Penry v. Lynaugh, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). This life sentence was a part of petitioner's background and record that he was entitled to have the sentencing jury consider in deciding whether he should live or die. Furthermore, it bore directly on the force and weight of the aggravating circumstance that petitioner previously had been convicted of a crime involving the use of violence to the person -- a factor proved by and found based upon his conviction for the murder of Joan Brady. Due process entitled petitioner to argue, and the sentencer to consider, evidence of the life sentence for this murder in response to this proffered aggravation. *E.g., Gardner v. Florida*, 430 U.S. 349 (1977). The lower court's rejection of these claims presents an important question to the capital sentencing jurisprudence, both in North Carolina and beyond. Review by this Court is in order.[4]

A. The Lower Court Erred In Sustaining The Trial Court's Refusal To Instruct The Jury That It Could Consider Evidence Of Petitioner's Current Life Sentence As Mitigating.

The sentencer in a capital case may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is a corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper*, 476 U.S. at 4 (citations omitted) (quoting *Eddings*, 455 U.S. at 110, 114). Once evidence was presented which the jury could reasonably find had mitigating value, petitioner had a

[4]The lower court rejected this argument, in part, because it considered petitioner's parole eligibility to be irrelevant to the capital sentencing decision. This Court has that issue before it in Simmons v. South Carolina, No. 92-9059. The instant case will be guided, if not controlled by Simmons. This petition may be held pending the forthcoming decision in Simmons.

constitutional right to have the trial judge submit this mitigating circumstance to the jury for its determination. *Lockett*, 438 U.S. at 605. To prevent the capital sentencer from giving independent mitigating weight to aspects of petitioner's record "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.*

North Carolina's capital sentencing scheme required petitioner's capital sentencing jury to deliberate on and resolve unanimously four questions before it could render a sentence of death. First, the jury must have unanimously agreed that the state proved at least one aggravating circumstance beyond a reasonable doubt. Second, the jury must have unanimously decided whether petitioner unanimously proved by a preponderance of the evidence the mitigating circumstances submitted to it by the trial court. The trial court was required to submit in writing to the jury and give oral instructions on any statutory or non-statutory mitigating circumstances supported by any evidence and requested by petitioner. *See State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (non-statutory mitigating factors must be listed individually and separately on verdict form); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988) (trial court must submit and instruct on all requested non-statutory mitigating factors supported by the evidence). Third, the jury must have unanimously determined beyond a reasonable doubt that the mitigating circumstances found to exist did not outweigh the aggravating circumstances found to exist. Finally, the jury must have unanimously determined beyond a reasonable doubt that the aggravating circumstances found to exist were sufficiently substantial, when considered in light of the mitigating circumstances found to exist, to warrant the imposition of the death penalty. N.C. Gen. Stat. §15A-2000.

Petitioner specifically requested that the trial court instruct the jury on the non-statutory mitigating circumstance that he had received a life sentence in Virginia for

another killing, about which the prosecution had introduced evidence, and argued showed dangerousness. [App. 86-88] Upon the prosecutor's objection, the trial court declined to submit this non-statutory mitigating factor. [App. 88] Unquestionably, the evidence supported this mitigating circumstance as the state itself introduced into evidence the historical fact of petitioner's life sentence for the killing of Joan Brady in Virginia several days before the death of Brenda Smith.

The fact that petitioner had been given a life sentence for this Virginia crime could have been deemed mitigating by his jury. Any aspect of his record can be mitigating if it would serve "as a basis for a sentence less than death." *Eddings*, 455 U.S. at 110. Given the fact that the jury had heard voluminous testimony regarding the killing of Joan Brady in Virginia and found it to be an aggravating circumstance, the imposition of a substantial penalty -- a life sentence -- for this killing could have served as a basis for a sentence less than death in the present case. In this context, it had mitigating value.

Axiomatically, the life sentence imposed on petitioner for his Virginia murder conviction, which was imposed shortly before his trial in this case, had potential value as mitigation. It was not "irrelevant" as the lower court concluded. Rather, it had mitigating value as a matter of constitutional law. One of the most settled principles of Eighth Amendment jurisprudence is that mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. The life sentence defendant received for Joan Brady's murder in Virginia was an aspect of petitioner's record. Any aspect of a defendant's background, even if not related specifically to his culpability for the crime he committed, is mitigating if it allows inferences that might serve as being a basis for a life sentence in the eyes of his

sentencer.[5] *Skipper*, 476 U.S. at 4-5.

As a fundamental evidential matter, the life sentence imposed on petitioner for the Virginia conviction was not irrelevant. It is analogous to a situation in which a perpetrator is wounded and paralyzed in the course of a killing. If petitioner had been shot by police officers when he was accosted and arrested and, as a result of this shooting, had been paralyzed, this fact would certainly be relevant to the sentencing determination as a matter of evidence law as well as a matter of constitutional law. Evidence is relevant if it tends to make any fact an issue more or less likely. *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)); *see* Fed. R. Evid. 401; N.C. R. Evid. 401. When his sentencer undertook the determination of whether a life or death sentence was appropriate, the fact of his paralysis would be relevant. It would certainly be relevant as a matter of constitutional law for mitigation purposes as it would be an aspect of his background and might well serve as a basis for a sentence less than death. Whatever favorable inference the sentencer might draw from the historical fact of his paralysis -- such as a diminished likelihood of escape or danger to others during incarceration -- petitioner would be entitled to that inference as a matter of constitutional law. In the same way, his certain, previously imposed life sentence in Virginia could have led to a favorable inference by the jury in this case.

The lower court's rather perfunctory rejection of this claim reveals an apparent misunderstanding of *Lockett* and its progeny. Seizing on a footnote in *Lockett* itself, the lower court dismissed this evidence as irrelevant.

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[5] *Skipper* also settled the question of whether factors may be mitigating that occur after petitioner's crime but before his sentence. *Skipper* held that a defendant's good behavior during his incarceration awaiting trial and sentence -- conduct that occurred after the crime was committed -- was relevant evidence in mitigation of punishment. 476 U.S. at 4. Quite plainly, the fact that the Virginia life sentence was imposed after petitioner's crime does not diminish its potential mitigating effect or render it somehow irrelevant.

> That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record. Because this evidence was irrelevant, we uphold the trial court's refusal to submit it as a mitigating circumstance. *See Lockett*, 438 U.S. at 604 n.12, 98 S.Ct. at 2964-65 n.12, 57 L.Ed.2d at 990 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense").

[App. 38] *Price*, 331 N.C. at 634-35, 418 S.E.2d at 177. No court, including the Supreme Court of North Carolina, may simply declare evidence to be irrelevant as mitigation. "[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." *McKoy*, 494 U.S. at 441. Indeed, *Skipper* reversed a determination that evidence of a defendant's adjustment to prison life was irrelevant, 476 U.S. at 7, and *Eddings* reversed a determination that evidence of a defendant's troubled childhood and emotional disturbance was irrelevant because it did not support an excuse for the crime. 455 U.S. at 113-16. *Skipper* and *Eddings* demonstrate that footnote 12 in *Lockett* is not carte blanche for lower courts simply to declare certain types of evidence legally irrelevant as potential mitigation.

Yet, "it is not enough simply to allow [petitioner] to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). In *Penry*, constitutional error occurred where the sentencer had no mechanism for considering the defendant's evidence of mental retardation or abused childhood. His sentencing

jury was never instructed that it could consider this evidence, which it heard, as mitigating evidence and that to could give mitigating effect to that evidence in imposing sentence. *Id.* at 320. Likewise, petitioner's jury was never instructed, despite a specific request for such an instruction, that it could consider evidence of the life sentence as mitigating and give mitigating effect to it in sentencing him. As in *Penry*, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [petitioner's life sentence] by declining to impose the death penalty, . . . the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328. *Lockett* and *Eddings* compelled this Court to remand *Penry* for resentencing to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* (quoting *Lockett*, 438 U.S. at 605; *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)). Similarly, *Penry*, *Lockett*, and *Eddings* compel a remand here.

B. The Lower Court Erred In Approving The Trial Court's Action Prohibiting Petitioner's Counsel From Arguing The Mitigating Effect Of Petitioner's Current Life Sentence.

The trial court also precluded, with the later approval of the Supreme Court of North Carolina, defense counsel from arguing legitimate matters of evidence and applicable legal principles that might have served as a basis for a sentence less than death. Both rejected the request of petitioner's counsel to argue to the jury below the effect of the life sentence petitioner received in Virginia for the murder of Joan Brady and the statutory provision allowing any life sentence imposed by the jury in this case to run consecutively to and commence at the expiration of this life sentence or any other sentence previously imposed outside North Carolina. It is beyond peradventure that *Lockett* and its progeny prohibit statutes, evidentiary rulings, and jury instructions that

preclude the sentencer from considering "factors which may call for a less severe penalty." The trial court's restrictions upon petitioner's closing arguments not only ran afoul of this constitutional prohibition, but also denied petitioner due process of law because petitioner's "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). The prosecutors argued at length about petitoner's dangerousness. [App. 97-98, 101-02, 103-05] By denying petitioner an opportunity to argue about the Virginia life sentence and the North Carolna law on consecutive sentences, the lower courts robbed him of his opportunity under *Gardner* to rebut this evidence and respond to these arguments.

In North Carolina, counsel may argue the law as well as the facts of a case to the jury. "In jury trials the whole case as well of law as of fact may be argued to the jury." N.C. Gen. Stat. §84-14; *see State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984); *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980). For example, a defense lawyer must be permitted to read to the jury statutory provisions prescribing the punishment for the crime charged. *E.g., State v. Irick*, 291 N.C. 480, 213 S.E.2d 833 (1977); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976). This Court has explicitly rejected "the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts." *Gardner*, 430 U.S. at 360. If this participation would not be superfluous when the ultimate sentencing decision is made by a trial judge, as in *Gardner*, it surely would not be inconsequential here where the final sentencing decision is made by the jury. *See* N.C. Gen. Stat. §15A-2002 (requiring trial judge to impose whatever sentence is recommended by the jury in a capital case).

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner, 430 U.S. at 360.

The prosecution was permitted to introduce, over petitioner's objections, the Virginia judgment rendered in the Joan Brady case. This included language that "Ricky Lee Price is hereby sentenced to confinement in the penitentiary of this Commonwealth for life under Indictment One for murder . . . ." Once the prosecution was permitted to introduce this evidence to support one of its submitted (and eventually found) aggravating circumstances, petitioner was entitled not only to offer evidence calculated to mitigate its possible effect, *Skipper*, 476 U.S. at 5, but also to rebut it altogether. *Gardner*, 430 U.S. at 362.

Furthermore, the state argued the Joan Brady murder not only showed a prior violent crime, but also petitioner's dangerousness. The evidence "in the guilt phase showe[ed] you the way in which this murder was carried out." [App. 97] Both of the psychiatrists "agree that the defendant is dangerous and is dangerous to others." [App. 98] With respect to the death of Joan Brady the prosecutor asked,

> Why did he kill Brenda? He admitted on the stand that a month before he talked about the Boston strangler movie where the defendant got off on an insanity defense to Mrs. Barley, Joan Brady's mother. So when Joan kicked him out and he went to Elaine Clay and she said, "You can't move in here," and he decided and formulated a plan to kill Joan Brady, and after he had done so and the days passed and he realized, "If I kill another one the same way, they are going to think I'm crazy. I've got this long track record, I can use it to my advantage." And so he turns what should be a mitigating facgtor into an aggravating factor. He turns it into a motive to kill Brenda Smith. His murder of Joan Brady led

directly to the murder of Brenda Smith.

[App. 100-01] Petitioner was entitled to resond with the applicable facts and law regarding life sentences.

During a colloquy between the trial court and counsel for both sides, outside the presence of the jury, petitioner proffered:

> My argument to the jury would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia.

At that juncture, the trial court told defense counsel "you may not argue that to the jury." This limitation was constitutionally unacceptable.

In the first place, this proposed argument was an accurate statement of the statutory law in North Carolina and was not misleading to the jury.

> When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed upon a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the Court.

N.C. Gen. Stat. §15A-1354(a). Furthermore, the mitigating effect of consecutive sentences is obvious when further resort is had to the law in North Carolina. "When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence. N.C. Gen. Stat. §15A-1355(a). The meaning of these two statutory provisions are clear and unmistakable. The trial court was empowered to impose a life sentence recommended by petitioner's jury

consecutive to the life sentence he was presently serving in Virginia, a fact about which his jury was already aware. Furthermore, the jury would doubtlessly conclude that if it recommended a life sentence for petitioner and the trial court imposed it consecutive to the Virginia life sentence, then the life sentence recommended in this case would begin *only after* the Virginia life sentence had expired.

The lower court resolved this issue by calling it an "argument about the legal effect of parole upon [petitioner's] sentence . . . in another guise. [App. 17] *Price*, 326 N.C. at 84, 388 S.E.2d at 100. In claiming it was simply not relevant, the court misapprehended the thrust of the proffered argument. It ignored the mitigating potential of consecutive life sentences. Furthermore, petitioner's sentencing jury was allowed to find and consider as an aggravating factor in this case that he had "been previously convicted of a felony involving the use of violence to the person; felony involving the use of violence to the person; to wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984." [App. 43] *See* N.C. Gen. Stat. §15A-2000(e)(3). The trial court's ruling allowed petitioner to be sentenced to death based on information he had no opportunity to explain to the sentencer in violation of the Fourteenth Amendment right to due process explained in *Gardner*, 430 U.S. at 362.

The prosecutors frequently described petitioner in their arguments as "a dangerous man." [App. 97] They urged the jury to protect Elaine Clay and others since the jury could not protect Brenda Smith and Joan Brady -- protection accomplished only by sentencing petitioner to death.

> You weren't able to protect the life of Joan Brady.
> You weren't able to protect the life of Brenda Smith.
> You have a duty. You must discharge it . . . .

> He has endangered the life of Elaine Clay and Robbie Davis . . . .
>
> The defendant is dangerous. The defendant says . . . "I don't care, Babe. Listen Carol, I kill your dumb ass, bitch, whore, whatever." Dangerous. Some girl named Carol. We don't even know who she is. He knows who she was.
>
> . . .
>
> You can protect Elaine Clay. You can protect nine-year-old Robbie Davis. You're all they have now.

[App. 105-06] This argument stressed petitioner's future dangerousness and opened the door for the appropriate rebuttal and explanation proffered by petitioner, but denied by the lower courts.

This error prejudiced petitioner by foreclosing his constitutional right to explain to the capital sentencing jury facts and circumstances that might lead it to fix punishment at something other than death. As *Gardner* made clear, precluding a capital defendant from being able to explain sentencing evidence offends basic Eighth and Fourteenth Amendment principles. "[I]t is possible that full disclosure, *followed by explanation or argument by defense counsel*, would have caused [a different sentencing] verdict." 430 U.S. at 362 (emphasis added).

Certainly, the prospect that petitioner might face two, consecutive life sentences, the second of which could only begin under settled North Carolina law at the expiration of the first, might lead the sentencer in this case to fix punishment at something less than death. Petitioner was almost thirty-years old at the time of his trial.[6] In

[6] Under the applicable provisions for a life sentence in North Carolina, he would not even be eligible for parole until he has served at least twenty years on his North Carolina sentence. *See* N.C. Gen. Stat. §15A-1371.

combination with a pre-existing Virginia life sentence imposed only two years before, petitioner's jury could be more assured of his continued confinement away from members of society for an extremely long period of time. This evidence also showed the substantial punishment petitioner received for a prior murder the jury found as a factor that aggravated petitioner's instant crime. Counsel could have used it to explain or rebut the force of this aggravating circumstance. These inferences, wholly consistent with and reasonably inferable from the law applicable to this case, could easily serve as a basis for a sentence less than death. The lower court misapprehended the teachings of this Court in this area. Accordingly, review by certiorari is in order.

II. THE TRIAL COURT'S DIRECTIVE FOR PETITIONER'S ANNOUNCED "HUNG" JURY TO RESUME DELIBERATIONS IN AN EFFORT TO RENDER A SENTENCING RECOMMENDATION, WITHOUT ASSURING THE JURY IT COULD RETURN WITHOUT AGREEING ON A UNANIMOUS RECOMMENDATION, RISKED A COERCED SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AMENDMENT.

After petitioner's jury deliberated as to punishment for three hours and forty-two minutes, in two sessions divided by an overnight recess, it signaled to the trial judge a desire to return to the courtroom. When the jury indicated in open court that it did not have a question, the trial court inquired why it had knocked on the door of the jury room. The jury foreman told the trial court, "We're hung." [App. 91] At this juncture, petitioner requested the trial court to impose a life sentence upon the jury's inability to reach a verdict. *See* N.C. Gen. Stat. §15A-2000(d). The trial court denied this request and, over petitioner's objection, instructed the jury that it had a duty to deliberate with a view toward reaching a sentencing recommendation. [App. 95-96] At no point, however, did the trial court inform the jury of the effect of its inability to reach a

unanimous recommendation, which, in North Carolina, is the imposition of a life sentence by the presiding judge. N.C. Gen. Stat. §15A-2000(d). After fifty-eight minutes of further deliberations, the jury returned a recommendation of death. Instructing a deadlocked jury of the need for it to continue its deliberations in an effort to reach a sentencing recommendation, without explaining the consequences of a deadlocked jury, improperly pressured dissenting jurors to surrender their convictions as to the appropriateness of a life sentence. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 (1988). Given the qualitative difference between a sentence of life imprisonment and a death sentence with its finality, the reliability of a sentence of death as the appropriate punishment in this case vanished. *Woodson v. North Carolina*, 420 U.S. 280, 305 (1976).

This case squarely presents the issue left open in *Lowenfield* regarding the unconstitutionally coercive effect of supplemental instructions to a deadlocked capital sentencing jury, where the supplemental instructions do not inform the jury it is permissible for the jury to fail to reach a unanimous decision. In light of the importance of this issue to capital sentencing proceedings and the division among the highest courts of many jurisdictions, this Court should issue a writ of certiorari.

After deliberating for nearly four hours, petitioner's jury voluntarily returned to the courtroom. When the trial court found the jury did not have a question, it inquired as to why the jury had knocked on the door. The foreman of the jury then informed the trial court that it was deadlocked as to a sentencing recommendation. After consulting with counsel, denying petitioner's request that a life sentence be imposed, and overruling his objections to the court's decision to give the jury further instructions, the trial court made the following statement to the jury:

> Members of the jury, I'm going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that *your recommendation must be unanimous*, that is, *each of you must agree on the recommendation*. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to the individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion of you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remained convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscientious conviction to reach a recommendation.

[App. 95-96] (emphasis added). In the context of the present case, these supplemental instructions risked the possible coercion of a recommendation of death in contravention of the Eighth Amendment as acknowledged in *Lowenfield*.

These facts raise a spectre of coercion from the supplemental instructions. Once the trial court had given these supplemental instructions, the jury deliberated for just over three-fourths of an hour before returning a recommendation of death. The jury's returning with its sentencing recommendation "soon after receiving the supplemental instruction . . . suggests the possibility of coercion." *Lowenfield*, 484 U.S. at 240; *United States v. United States Gypsum Company*, 438 U.S. 422, 462 (1978). A critical distinction exists, however, between the challenged instruction below and the one given in *Lowenfield*.[7] In *Lowenfield*, the trial court began its supplemental instruction by explaining, "As I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment . . . ." *Id.* at 235. Thus, the jury in *Lowenfield*, unlike petitioner's jury, not only knew the effect of a deadlock but also realized *it was permissible* to fail to reach a unanimous sentencing recommendation. The trial court never told petitioner's jury it could fail to reach a unanimous sentencing recommendation, that the jury could "hang." Despite finding the supplemental instruction in Lowenfield not coercive, this Court recognized the potential problem. It limited the scope of *Lowenfield* as follows:

> By so holding we do not be understood as saying other combinations of supplemental charges and polling may not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.

Id. at 241. The court below rejected this argument on the merits. [App. 22] *Price*, 326 N.C. at 90-93, 388 S.E.2d at 103-05. The court essentially deferred to the trial court's discretion as to whether supplemental instructions were appropriate. *Id.* at 92-93, 388

[7] Furthermore, defense counsel in *Lowenfield* failed to object to the supplemental instruction, unlike the present case. *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988). This Court found "such an omission indicate[d] that the potential for coercion argued now was not apparent to one on the spot." *Id.* On the contrary, the "potential for coercion" was readily apparent to those "on the spot" in the present case.

S.E.2d at 105. It failed to explain how the potential coercion feared in *Lowenfield* evaporated. The present case graphically illustrates the potential prejudice on the question left open in *Lowenfield*.

Courts in a number of other jurisdictions have reached radically different results on facts almost identical to those at bar, creating a significant division among the highest courts of many jurisdictions on this issue. *See, e.g., State v. Williams*, 392 So.2d 619 (La. 1990); *Rose v. State*, 425 So.2d 521 (Fla), *cert. denied*, 461 U.S. 909 (1983); *Legare v. State*, 250 Ga. 875, 302 S.E.2d 351 (1983). In *Williams*, the jury returned to the courtroom after deliberating on punishment for approximately three hours. The jury foreman essentially asked the trial court if the jury's decision had to be unanimous, to which the trial court responded affirmatively. The jury asked to continue its deliberations and eventually recommended a sentence of death. 392 So.2d at 633. Noting that the trial court was obligated to inform the jury fully as to the consequences of their sentencing recommendation, the Louisiana court found reversible error. "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed so as to minimize the risk of arbitrary and capricious action." *Id.* Petitioner's jury, on the other hand, could only speculate as to the possible outcome in the event of non-unanimity. The jurors could rationally have surmised that a new sentencing hearing, or perhaps even a new trial, before a different jury might be required. The harm of such a misapprehension is obvious.

> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to

> suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action.
>
> If only one of the twelve jurors was swayed by the failure to inform him fully of the consequence of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed.

Id. at 634-35.

The Florida Supreme Court reached a similar result in *Rose*. The jury in that case deliberated for a period of time with respect to punishment and sent the trial court a note saying, "We are tied six to six, and no one will change their mind at the moment. Please instruct us." The trial court gave the jury an *Allen*-type charge[8] mirroring the instruction given below. 425 So.2d at 525. The trial court should have advised the jury of the absence of a necessity to have the majority recommend death or life in prison. "There was no reason to give the '*Allen* charge' during the penalty phase of the trial. *Id*; *accord Patten v. State*, 467 So.2d 975, 979-80 (Fla.) (vacating a death sentence where an *Allen* charge was given during the penalty phase of defendant's trial after the jury indicated it was deadlocked), *cert. denied*, 474 U.S. 876 (1985).

Legare involved the Georgia capital sentencing statute which, like that of North Carolina, *requires* the trial court to impose a life sentence if the jury cannot unanimously recommend a sentence of life or death.[9] The sentencing jury in *Legare* indicated to the trial court it was divided ten-to-two. The trial court then gave an *Allen*-type charge. 250 Ga. at 876, 302 S.E.2d at 352. The court found reversible error and awarded the defendant a new sentencing hearing. It explained "the [*Allen*] charge is simply not a correct statement of the law. If the jury is deadlocked, the trial judge must impose a life

[8] *See Allen v. United States*, 164 U.S. 492 (1896).

[9] O.C.G.A. §17-10-31; *see Hill v. State*, 250 Ga. 821, 301 S.E.2d 269 (1983); *Miller v. State*, 237 Ga. 557, 229 S.E.2d 376 (1976).

sentence." *Id.* at 877, 302 S.E.2d at 353.

The Delaware Supreme Court pointedly articulated the danger in such a supplemental instruction so graphically illustrated here as well as in *Williams*, *Rose*, and *Legare*. *E.g.*, *Rush v. State*, 491 A.2d 439 (Del. 1985). The *Rush* jury deliberated during the penalty phase for just over two hours. Upon its inability to give a penalty recommendation, the trial court gave an instruction similar to the one given below. In less than an hour, the jury returned a sentence of death. *Id.* at 450-52. In considering a challenge to the supplemental instruction, the Delaware court noted the reason for an *Allen*-type charge at the guilt phase of a trial. It is designed to obtain a verdict and avoid a retrial. *Id.* at 452. While it is still a delicate matter during the guilt phase, at the penalty stage, such an instruction is "overly coercive." *Id.* at 453. Under the law, no juror is obliged to rethink or reconsider his penalty determination once an announcement has been made that the jury is deadlocked. *Id.*

The deadlock in *Rush* is particularly compelling. When the jury returned to the courtroom, the foreman told the trial court some of the jurors could not "have their viewpoint changed under any circumstances. Therefore, we wish you to instruct us what we should do about the form." 491 A.2d at 453. The jury had effectively announced an ultimate decision of being deadlocked, much as petitioner's jury did in the present case. Upon this inquiry, the trial court erred in having the jury continued its deliberations. "Under the circumstances then existent in this case, no juror voting against the death penalty was obliged under the law to 'think it over.'" *Id.*[10]

[10] The New Jersey courts have reached similar results. *E.g.*, *State v. Ramseur*, 524 A.2d 188 (N.J. 1987). In that case, the jury had deliberated with respect to a possible capital sentence for over four hours. It then indicated to the trial court that it was hung. The trial court gave supplemental instructions similar to those given below but failed to "reinform the jury that in capital cases the law permits the issue of penalty to be finally resolved by a non-unanimous verdict, and that a non-unanimous verdict would result in a sentence of imprisonment." *Id.* at 280. The remarks given in *Ramseur*, like those given below, "could have been understood only to mean that by failing to reach unanimity, the jury was not properly performing its function." *Id.* at 282. In reaching this result, the New Jersey court rejected "the premise . . . that jurors will,

Although the decisions from other jurisdictions on this issue are not unanimous, *e.g., People v. Kimble*, 44 Cal. 3rd 4809, 244 Cal. Rptr. 148, 749 P.2d 803 (1988); *Romine v. State*, 256 Ga. 521, 250 S.E.2d 446 (1986), the weight of authority supports petitioner's position. The division among the states demonstrates, at the very least, the need for this Court's intervention in this important issue. The potentially coercive effect of an *Allen*-type charge in the sentencing phase of a capital case recognized in *Lowenfield* is a risk the Eighth Amendment will not permit. If a single juror agreed to the sentencing recommendation reached here because of the erroneous impression that unanimity was required, that juror was the difference between life and death for petitioner. In a case of jury deadlock, the exacting standard of reliability demanded in capital sentencing proceedings offsets any concern the state might have with juror abdication. Given the division of authority among the highest courts of a number of jurisdictions on this important issue to capital proceedings, review of this question is in order.

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if given the chance, take the easy way out and fail even to try to reach agreement" as to a sentencing recommendation.

> The process of death qualification, the jurors' oath, and the trial court's instructions are all designed to assure that the jury will make a conscientious attempt to follow the law in reaching its verdict. The entire system of capital punishment depends on the belief that a jury representing the conscience of the community will responsibly exercise its guided discretion in deciding who shall live and who shall die. To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possible inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence.

Id. Indeed, North Carolina's Chief Justice long ago reached a similar conclusion. "I believe the instruction would inform the jury that it cannot escape the task of recommending a sentence. Whatever it does some sentence will be imposed as a result." *State v. Johnson*, 298 N.C. 355, 378, 259 S.E.2d 752, 766 (1979) (Exum, J., dissenting). Unfortunately, the court below does not follow this advice.

III. WHETHER AN APPELLATE COURT MAY EVER DISREGARD AS HARMLESS ERROR A JURY INSTRUCTION ALREADY FOUND UNCONSTITUTIONAL BY THIS COURT, MCKOY v. NORTH CAROLINA, THAT IMPERMISSIBLY LIMITS THE ABILITIES OF INDIVIDUAL JURORS TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE IN THE CAPITAL CASE, WHERE SUCH ERROR IS FUNDAMENTAL TO THE VALIDITY AND RELIABILITY OF THE CAPITAL SENTENCING PROCESS AND WHERE NO RELIABLE AND SATISFACTORY EXTRINSIC EVIDENCE SHOWS THE ERROR HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner's jury received multiple admonitions it must agree unanimously that a given mitigating circumstance existed before any individual juror could consider the evidence in the sentencing decision. This instruction was unconstitutional. *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). This Court remanded petitioner's case to the Supreme Court of North Carolina for reconsideration in light of *McKoy*. *Price v. North Carolina*, 494 U.S. ___, 112 L.Ed.2d 7 (1990). Relying on an oral poll of the jury by the trial court, the lower court concluded the *McKoy* error was harmless. [App. 32-35] *Price*, 331 N.C. at 623-28, 418 S.E.2d at 171-74. The court did not find, however, that petitioner's jury was not precluded from considering relevant mitigating evidence in the sentencing process. The lower court also did not find the error harmless due to the failure to present mitigating evidence or because of the relative weakness of the mitigating evidence affected by the unconstitutional instructions. See McNeil v. North Carolina, 494 U.S. 1050 (1990) (Kennedy, J., dissenting from the remand in light of McKoy). The interpretation given by the jurors in response to the poll in this case cannot be squared with how a reasonable juror might have understood the questions in the poll in light of all of the instructions given in this case. The lower court applied an incorrect harmless error analysis given the fundamental nature of the constitutional error in this capital case. Accordingly, review by certiorari is in order.

After its lengthy deliberations, the jury returned to the courtroom and announced it had reached a unanimous recommendation as to sentence. After

determining the jury had recommended a sentence of death, the trial court directed the clerk to poll jurors individually.[12] Upon petitioner's request, the polling process involved an inquiry as to each aggravating and mitigating circumstance. Contrary to the lower court's analysis, the poll does not conclusively show each juror personally rejected the unfound mitigating circumstances. The jury poll in no way demonstrates that the erroneous instructions did not preclude at least one juror from considering one or more of these mitigating circumstances not unanimously found when weighing all the circumstances in the ultimate sentencing decision, in violation of *McKoy*.

Analyzing the inadequacy of the jury poll to dispel the *McKoy* error begins with the trial court's charge to the jury. When he explained the second issue in the case, he told the jury:

> Issue Two is "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?"

[App. 62] He then proceeded to instruct the jury as to each of the ten mitigating factors, including the nine specific mitigating factors and the catch-all provision. At the conclusion of his instructions on each mitigating circumstance, he told the jury:

> If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

[App. 65, 66-67, 68, 69, 70, 71-72, 73, 74, 75, 76] These instructions plainly told jurors that the answer to each, individual mitigating circumstance must be "No" if there was a lack of unanimity with respect to the particular circumstance. In other words, unless all twelve jurors agreed that a particular mitigating circumstance existed, the answer would

[12] In a capital case, the jury must be individually polled to establish each juror's agreement with the sentencing recommendation. N.C. Gen. Stat. §15A-2000(b).

be "No."

Immediately upon the jury's announcement that it had arrived at a sentencing recommendation, the trial court instructed the clerk to take the recommendation, which occurred as follows:

> THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your recommendation? The recommendation that shows that:
>
> "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."
>
> As to the aggravating circumstances, "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes."
>
> "(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes."
>
> "Issue Two: Do you unanimously find that the evidence of the existence of one or more of the following mitigating circumstances: Answer: Yes."
>
> As to the mitigating circumstances, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No."
>
> "(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence: Answer: No."

"(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No."

"(4) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No."

"(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No."

"(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug use. Answer: No."

"(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No."

"(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No."

"(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes."

"(10) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No."

"Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes."

"Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes."

The recommendation is "we, the jury, unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death."

This is your recommendation, so say you all?

THE COURT: If this is your recommendation, so say you all, raise your right hand.

Let the record reflect that each and every juror has raised his or her right hand.

[App. 10?-??] As the record reflects, all twelve jurors raised their hands indicating assent to all of the answers on the Issues and Recommendation form, including the negative answers to nine of the ten mitigating circumstances. At this juncture, the trial court directed that the jury be polled individually. [App. 1??] The clerk proceeded to conduct this poll by reading each finding with the jury's answer and then seeking each individual juror's assent. [App. 1??-1??] For example, the clerk addressed the first juror as follows with respect to the first mitigating circumstance:

> As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbances. Answer: No." Is that your answer?

[App. 1??] When the juror responded affirmatively, the clerk then asked him "do you still assent thereto?" [App. 1??]

A reasonable likelihood arose from these unconstitutional instructions that an individual juror would understand that *her* answer to a specific mitigating circumstance must be "No" *unless the entire jury agreed* that this mitigating circumstance was proved by a preponderance of the evidence. *See Boyde v. California*, 494 U.S. 370 (1990). In the context of the entire charge, a reasonable juror would be hard pressed to understand the challenged instructions to mean that a negative finding of a particular mitigating factor would not be *her* answer if the jury could not unanimously agree that the mitigating factor existed. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might. [A] common sense understanding of the instructions in light of all that has taken place at the trial is likely to prevail over technical hairsplitting." *Id.* at 329. This "common sense" understanding is particularly appropriate in this case where an individual juror was responding to a question without opportunity for deliberation or discussion with respect to its meaning.

The trial court instructed the sentencing jury on at least ten occasions that it *must* answer "No" to a mitigating circumstance if the jury did not agree unanimously as to its existence. There was no suggestion that any individual juror could have a different ultimate answer to a particular mitigating circumstance than the answer of the jury. There could be only one answer for the entire jury. A reasonable juror would have understood this instruction to mean that the jury's negative answer and, hence, her negative answer to any particular circumstance depended on the absence of a unanimous agreement that the circumstance had been proved by a preponderance of the evidence. If a juror so understood the instructions, then *her individual* answer to a mitigating circumstance would be "No" if the jury failed to agree unanimously as to the existence of this circumstance. Under these conditions, an individual juror's assent to the "No" answer during the poll would simply indicate her agreement that the jury failed to find this circumstance unanimously, not that *she* would have failed to find it if she

were free under the trial court's instructions to make her own individual determination.

Quite simply, a reasonable juror would have understood the poll to query whether the answers on the issue sheet were the jury's answers. The question asked if a particular answer was "your answer." At each point in the trial when the judge used the word "you" or "your," he referred to the entire jury not individual jurors. The jury was impaneled with this pronoun collectively; the trial court addressed the jury collectively with this pronoun; and he used the pronoun collectively to frame all of the sentencing issues. Each juror would have understood this question to address whether the answer to a given mitigating factor was *the jury's* answer. An individual's assent to any answer on the issue sheet meant no more than she agreed that the answer was that of the jury.

The Supreme Court of North Carolina, on remand from this Court in light of *McKoy*, found the constitutional error under *McKoy* in this case harmless solely because of this polling process. [App. 34] *Price*, 331 N.C. at 628, 418 S.E.2d at 173. It did not find the absence of evidence to support the numerous mitigating factors submitted to but not found unanimously by petitioner's sentencing jury.[13] Without referring to *Boyde*, the lower court concluded:

> A reasonable juror would understand that if she were being questioned individually, the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors her did not understand it to be otherwise.

[App. 34] *Price*, 331 N.C. at 627-28, 418 S.E.2d at 173. The decision fails to come to grips with the reasonableness of a contrary interpretation by one, *individual* juror given the thorough indoctrination through all of the instructions in this case that each juror

[13] Indeed, the court said there was evidence to support several of the mitigating circumstances not found by the jury. [App. 33] *Price*, 331 N.C. at 628, 418 S.E.2d at 173.

must answer any mitigating circumstance "No" if the entire jury does not unanimously find the circumstance to exist.

A reasonable juror would have understood the instructions to mean that the only appropriate answer to a mitigating factor was "No" if the jury failed to find it unanimously. When that juror then responded affirmatively to the above polling inquiry, she may reasonably be saying: "Yes. The jury has failed to agree unanimously as to the existence of this mitigating factor. I assent to the "No" answer because we were unable to agree unanimously that this mitigating fctor existed." Under such an interpretation, the polling process does not prove the absence of *McKoy* error or that any such error was harmless. Contrary to the lower court's analysis, the present record does not show conclusively that each of petitioner's jurors rejected any one much less all of the nine unfound mitigating factors.

This Court has had occasion many times in the past to answer questions about the jury's deliberations in the sentencing phase of a capital case so that, among other things, the structure of capital sentencing hearings would permit full consideration of mitigating evidence and so that the actors in the system - be they jurors or judges - would be free to play the roles they have been assigned in such hearings. The Eighth and Fourteenth Amendments require no less. As this case demonstrates, there are still more questions to be answered.

The members of the jury in this case were unconstitutionally instructed that they could not consider and give effect to whatever evidence they deemed to have mitigating value unless all of the jurors agreed that such evidence had mitigating value. The state appellate court then found that this error was harmless based on a misreading of the results of a jury poll. No one ever heard from the individual jurors in this case an answer to the question of how they would have voted - life or death - if they had been allowed to do what the Constitution requires that they are free to do, i.e., to consider mitigating circumstances that fewer than all of the jurors thought had been established by a preponderance of the evidence.

The flaw of the unanimity rule, as found by this Court in McKoy, is the deprivation of a defendant's right to have each juror, individually, weigh such mitigating circumstances as he or she deems established against such aggravating circumstances as are proved by the state, and then vote individually on life or death. This flaw was not avoided for the Petitioner by a mere polling to ascertain whether the foreman reported correctly on unanimity, for it is the unanimity requirement itself that is the flaw. This Petitioner, no less than petitioner McKoy, is entitled to a new penalty trial.

In Clemons v. Mississippi, 494 U.S. 738 (1990), this Court held that it was constitutionally permissible for state appellate courts to engage in harmless error analysis in an effort to determine "whether beyond a reasonable doubt the result would have been the same" if a particular aggravating circumstance had not been erroneously defined in the jury instructions.

Citing Clemons, and without further analysis, the North Carolina Supreme Court held in McKoy, 394 S.E.2d at 433, that harmless error analysis was equally applicable to improper jury instructions in the sentencing phase of a capital case that restrict the ability of individual jurors to consider and give effect to mitigating evidence. This Court should decide whether such a broad reading of Clemons is appropriate when the constitutional defect at issue encroaches upon the jury's

consideration of mitigating evidence, a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

As the North Carolina Supreme Court itself acknowledged, it would be a "rare case" where McKoy error would be harmless. McKoy, 394 S.E.2d at 433 & n.4. Indeed, the instant case demonstrates the need for a clear rule in cases where there is no record evidence of what the individual jurors had decided, lest appellate courts engage in manipulation of the record to "bootstrap" their way to an affirmation of a death sentence. The requirement that the jury in a capital case be given an unfettered opportunity to weigh mitigating evidence in deciding whether to impose the death penalty is one of those constitutional guarantees that "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising form its denial," Chapman v. California, 386 U.S. 18, 43 (1967) (Stewart, J. concurring) (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)).

Certain constitutional violations "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Satterwhite v. Texas, 486 U.S. 249, 256 (1988), accord Chapman, 386 U.S. at 23 & n.8 (citing Gideon v. Wainright, 372 U.S. 335 (1963) (denial of right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased tribunal)). Where a

constitutional violation is not simply a "trial error," the effect of which can be quantitatively assessed, but instead is a defect that alters "the framework within which the trial proceeds," the violation "def[ies] analysis by 'harmless-error' standards" and requires that the judgment be reversed. Arizona v. Fulminante, 111 S.Ct. 1246, 1265 (1991).

The Eighth Amendment requires an individualized assessment of whether death is an appropriate punishment. Zant v. Stephens, 462 U.S. 862, 879 (1983). To comply with this requirement, "the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." McKoy, 494 U.S. at 443 (quoting Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989)).

Constitutional violations that prevent full participation by individual jurors in deliberations about the death penalty are more than mere trial errors - they necessarily affect the framework within which a capital sentencing hearing proceeds. For example, in Gray v. Mississippi, 481 U.S. 648 (1987), this Court held that the erroneous exclusion of a single venire member due to his or her views on capital punishment could *never be considered harmless*. Id. at 668 (emphasis added). This Court also has reversed convictions without engaging in harmless error analysis when constitutionally defective jury instructions affect the functioning as opposed to the composition of a jury. See Jackson v. Virginia, 443 U.S. 307,

320 n.14 (1979) ("[F]ailure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error") (citing Cool v. United States, 409 U.S. 100 (1972); Cf. Taylor v. Kentucky, 436 U.S. 478 (1978)).

These principles are especially important where "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences." Caldwell v. Mississippi, 472 U.S. 320, 330 (1985), see Luginbuhl, Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances, 16 Law & Hum. Behav. 203, 214-15 (1992) (improper unanimity instruction effectively prevents consideration of mitigating circumstance "by a juror who thought that it existed by a preponderance of the evidence.") Such a bias against consideration of mitigating evidence was the very reason this Court voided the unanimity instruction given in the sentencing phase of petitioner's trial, see McKoy, 494 U.S. at 439-40, and it is simply impossible now to determine what effect that bias had on the jury's deliberations in this case. "[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." Satterwhite, 486 U.S. at 258.

The decision in Clemons is not to the contrary. In that case, this Court found that a constitutionally defective instruction concerning one of three aggravating circumstances found by the jury might constitute harmless error if it were

possible to determine beyond a reasonable doubt that "the result would have been the same" had that aggravating circumstance been properly defined in the jury instructions. Clemons, 494 U.S. at 754. This case related solely to definition of the "heinous, atrocious and cruel" aggravating circumstance and had nothing to do with the way in which the jury was to approach their deliberations on mitigation. See Pensinger v. California, 112 S.Ct. 351 (1991) (noting that the jury instruction in Clemons "did not alter the mix of evidence weighed by the jury at the penalty phase.")

It is one thing to decide that invalidation of one of three aggravating circumstances found by the jury constitutes harmless error, although this Court refused to accept that conclusion on the record before it in Clemons. It is quite another to announce that McKoy error had no effect on the decision-making processes of the twelve persons in the jury room, a question on which there is not and cannot be any record evidence.

This Court has been presented with this question in a previous request to review a decision of the Supreme Court of North Carolina. Although review was denied, three justices dissented and would have vacated the judgment in that case. Allen v. North Carolina, 113 S.Ct. 1402, 1403 (1993)(Justices Blackmun, O'Connor, and Souter would grant the petition and reverse the judgment). The identical polling process relied upon below to find McKoy error harmless had been used in Allen. Review of this harmless error analysis is in order now.

IV. THE LOWER COURT APPLIED AN IMPROPER HARMLESS ERROR ANALYSIS TO THE UNCONSTITUTIONAL JURY SELECTION PROCESS THAT VIOLATED MORGAN v. ILLINOIS WHEN IT RELIED ON INQUIRIES OF PROSPECTIVE JURORS THAT WERE IDENTICAL TO THOSE INQUIRIES FOUND TO BE CONSTITUTIONALLY DEFICIENT IN MORGAN ITSELF, IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY.

During the early stages of the jury selection proceedings, petitioner attempted to question a prospective juror regarding whether he would require the prosecution to prove one or more aggravating circumstances before he would return a death sentence. The trial court sustained the prosecutor's objection to this question and precluded this line of inquiry. [App. 84-86] Petitioner desired to question all prospective jurors in this manner and the trial court so noted for the record. The Sixth Amendment endows petitioner with the guarantee of an impartial jury in accordance with rudimentary due process. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976). As a corollary matter, the Fourteenth Amendment entitles petitioner the opportunity to take reasonable steps through the jury selection process to ensure juror impartiality with respect to the imposition of a death sentence. *Morgan v. Illinois*, 504 U.S. ___, 119 L.Ed.2d 492, 502-07 (1992). Petitioner's challenges to potential jurors may well be the most important devices designed to ferret out latent prejudices in potential jurors. *See Pointer v. United States*, 151 U.S. 396 (1894). The undue restrictions imposed upon his voir dire of potential jurors were particularly egregious since they prevented him from ascertaining whether prospective jurors would be fair and impartial in deciding whether to impose a sentence of life or death.

Morgan itself rejected the notion that asking if prospective jurors could "follow the law" satisfied the right to ask if they could consider a life sentence. Yet the lower court used this inquiry to find the admitted error harmless.[11]

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[11]The intervening decision in Brecht v. Abrahamson sheds new light on the need for state appellate courts to rigorously engage in harmless error analysis before denying relief. This Court This case could be remanded in light of Brecht.

David M. Kimbrough was one of the twelve prospective jurors passed to petitioner by the prosecution. Near the beginning of his questioning of Kimbrough, petitioner asked whether Kimbrough thought it should be necessary for the state to prove aggravating circumstances in addition to proving premeditated and deliberate murder before he would impose a sentence of death. The prosecutor's objection to this question was sustained. Petitioner rephrased his inquiry, which was also precluded by the trial court. The questions were designed to determine if the prospective juror had prejudices or attitudes, latent or otherwise, that might influence his ability fairly and impartially to consider both life and death as possible sentences in a capital case. Whether he thought the state should be required to prove aggravation *in addition* to proving a first degree murder in order to obtain a sentence of death strikes at the heart of his ability to be fair and impartial.

The following colloquy occurred during petitioner's questioning of this prospective juror:

> [DEFENSE COUNSEL]: Do you have any preference at that point, nothing else appearing, do you feel that a person who is guilty of first degree murder, premeditated mruder, do you feel that nothing else appearing that the death penalty is the appropriate punishment?
>
> [PROSPECTIVE JUROR]: It would depend --

> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: May I approach the bench?
>
> THE COURT: Yes, sir.
>
> [UNRECORDED SIDE-BAR.]
>
> [DEFENSE COUNSEL]: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?
>
> [PROSPECTIVE JUROR]: According to the Judge's instructions, yes.
>
> [DEFENSE COUNSEL]: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?
>
> [PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.

THE COURT: Let the record so reflect.

[App. 84-85] Petitioner plainly sought to inquire whether prospective jurors would require the prosecution to do more than prove his guilt of first degree murder before being willing to return a sentence of death. He desired to have more than a general willingness to follow the law and the trial court's instructions regarding aggravating and mitigating factors. Under *Morgan*, he was entitled to this further inquiry.

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed.

Morgan, 119 L.Ed.2d at 506. Petitioner's jurors, like this one, might well feel confident in their ability to consider only aggravating factors under the trial court's instructions despite latent dogmatic beliefs that a premeditated and deliberate murder, standing alone, is sufficiently aggravated to justify a sentence of death.

The North Carolina Supreme Court, admittedly without the benefit of *Morgan*, rejected this claim on the merits. Construing petitioner's questions as an effort to gauge prospective jurors' approval or comprehension of the law, it found no abuse of discretion.

> Although it is proper under appropriate circumstances to inquire of jurors whether they can follow the law as charged by the court, *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581, 589 (1980), it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of the law. Moreover, while counsel may inquire diligently into a juror's fitness to serve, the extent and manner of that inquiry rests within the sound discretion of the trial court. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant has failed to show either a clear abuse of discretion on the part of the trial court or resulting prejudice.

[App. 6] *Price*, 326 N.C. at 66-67, 388 S.E.2d at 89.

Morgan dispells two important misapprehensions in this analysis. First, due process entitles petitioner to make inquiries of a prospective capital juror beyond his naked assertion that he can follow the law. Petitioner may, therefore, "gauge" the juror's disposition toward the law. *Morgan*, 119 L.Ed.2d at 502-06. Second, the limitations on voir dire may not be delegated to the trial court's discretion. Where constitutional rights are at issue, appellate review must be readily available. *Id.* at 503.

The lower court, on remand, found Morgan error in petitioner's capotal trial. State v. Price, 334 N.C. 615, 617-18, 433 S.E.2d 746, 747-48 (1993). It found the error harmless, however, because

> [t]he trial court instructed the potential as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

Id. at 618, 433 S.E.2d at 748 (emphasis added). The sort of harmless error analysis is woefully flawed.

Morgan itself found such questioning insufficient to cure the constitutional error. Inquiries about the general fairness of prospective jurors "and 'follow the law' questions" are insufficient because "such jurors could in all truth and candor respond affirmatively, personally confident that [their] dogmatic views are fair and impartial, while leaving the specific concern [of the ability to consider a life sentence after finding petitioner guilty of first degree murder] unprobed." Morgan, 119 L.Ed2d at 506.

At its essence, Morgan error is simply one of those rare types of federal constitutional violations that cannot be deemed harmless beyond a reasonable doubt. E.g., Gray v. Mississippi, 481 U.S. 648 (1987)(exclusion of veniremember improperly due to views about capital punishment never harmless). It is impossible to ascertain the effect, or lack thereof, from the improper seating of a veniremember.

Petitioner suffered from having several veniremembers seated without as adequate opportunity to ascertain their abilities to consider a life sentence once they found him guilty of first degree murder and found the existence of an aggravating circumstance. Until that point, he would not be eligible for a snetence of death in North Carolina. The lower court's harmless error analysis simply does not comport with basic constitutional requirements, particularly in light of the more lenient harmless error standard now applicable in federal habeas corpus. Review of this issue is warranted.

V. THE PROSECUTOR'S USE OF PETITIONER'S PURPORTED ABSENCE OF REMORSE AT TRIAL, ARISING SOLELY FROM HIS UNWILLINGNESS TO ADMIT GUILT TO THE JURY, RENDERED THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AMENDMENT.

During his closing argument, the prosecutor stressed petitioner's purported absence of remorse at trial, long after the crime itself had been perpetrated. [App. 99-100] The basis underlying this contention was petitioner's unwillingness to admit guilt before the jury in the courtroom. Stated another way, it was his plea of not guilty, refusal to incriminate himself, and insistence on his constitutional right to trial by jury with a presumption of innocence to which this argument was directed. Prosecutorial comment on his failure to express remorse and thereby admit guilt violated his right to freedom from self-incrimination. *See Griffin v. California*, 380 U.S. 609 (1965). Where a defendant's own actions or words outside the courthouse reflect remorselessness, such evidence in some circumstances might be relevant to punishment. Similarly, if a defendant advances remorse in mitigation, he might open the door to rebuttal by the state. To exploit at sentencing petitioner's failure to express remorse at trial by virtue of his unwillingness to admit guilt, however, contravenes fundamental constitutional protections, such as freedom from self-incrimination and due process of law, and risks an unreliable death sentence under the Eighth Amendment. A significant division of authority exists among the jurisdictions on this important issue, requiring resolution by this Court. *See, e.g., Lesko v. Lehman*, 925 F.2d 1527 (3d Cir.), *cert. denied*, 116 L.Ed.2d

226 (1991).

The Court below rejected this argument, saying simply these remarks referred only to petitioner's demeanor in the courtroom. [App. 16] *Price*, 326 N.C. at 85, 388 S.E.2d at 100. A majority of the court had reached a similar conclusion, holding that such an argument does not unconstitutionally exploit defendant's unwillingness to admit guilt. *State v. Artis*, 325 N.C. 278, 327-28, 384 S.E.2d 470 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023 (1990). Chief Justice Exum dissented in *Artis* and took the majority to task for ignoring the due process implications of this argument. The majority ignored, he said, how "such argument impermissibly compromises [petitioner's] right to plead not guilty and to stand by his plea throughout the proceedings and, thereby, denies him due process. *Id.* at 350, 384 S.E.2d at 512 (Exum, C.J., dissenting). As Chief Justice Exum also noted, the majority's reasoning is wholly at odds with other jurisdictions which have considered this important constitutional issue. *Id.*

Petitioner has a constitutional right to trial by jury upon a plea of not guilty and stand by that plea throughout the proceedings. He has a concomitant constitutional right to testify in support of that plea and to stand by that testimony throughout the proceedings. *See Owen v. State*, 656 S.W.2d 458 (Tex. Crim. App. 1983) (en banc). To permit the state to assert his failure to express remorse "would place an accused in the paradoxical position of saying I am sorry for a crime of which I am not guilty" and nevertheless seek leniency at sentencing. *Id.* at 459; *accord Dickinson v. State*, 685 S.W.2d 320 (Tex. Crim. App. 1984).

The analysis in *Owen* is persuasive. Although a non-capital case, it featured a separate sentencing phrase before the jury. The defendant pled not guilty and, during the guilt phrase, testified that he acted in self-defense. At sentencing, he did not testify but nonetheless sought a lenient sentence. In arguing to the jury at sentencing, the

prosecutor twice contended that the defendant failed to show remorse and thus had not demonstrated a potential for rehabilitating. The court found the argument improperly penalized the defendant's exercise of his right to plead not guilty and to put the state to its proof. Even though the trial judge *sustained* the defendant's objections, the court held a mistrial should have been granted due to the grave potential for prejudice.

Similar reasoning led the Florida Supreme Court to preclude using a defendant's failure to express remorse at trial against him at a capital sentencing hearing. "To equate a defendant's not-guilty pleas with lack of remorse which may be considered in weighing an aggravating circumstance in support of imposition of the death penalty would in effect punish the defendant for exercising rights of due process." *Pope v. State*, 441 So.2d 1073, 1077 (Fla. 1983); *accord Trawick v. State*, 473 So.2d 1235 (Fla. 1985). The South Carolina Supreme Court also found such an argument improper. *State v. Sloan*, 298 S.E.2d 92, 95 (S.C. 1982) (finding reversible error where prosecutor briefly argued capital defendant pled not guilty and therefore lacked remorse, saying, "Has anyone said to you he's sorry, sorry for what he did? . . . What have you been told up until you found him guilty. He has pled not guilty.").

California has reacted similarly to its sister states. *People v. Coleman*, 459 P.2d 248 (Cal. 1969). In *Coleman*, the defendant testified and denied participation in the homicide. At the penalty phase arguments, the prosecutor criticized his failure to admit guilt and show remorse, much like the argument *sub judice*. The California Supreme Court soundly condemned this type of argument.

> A defendant would be placed in an intolerable dilemnma if his failure to confess following conviction could be urged at the trial on the issue of penalty as evidence of lack of remorse. To silence such argument, a defendant who had denied his guilt at the trial on the issue of guilt would have to admit or commit perjury at the trial on the issue of penalty.

> and he could do neither without in effect forfeiting his right to urge the trial court on motion for a new trial to reweigh the evidence on the issue of guilt. We conclude that any argument that failure to confess should be deemed evidence of lack of remorse is not permissible.

Id. The prosecutorial argument in petitioner's situation is virtually indistinguishable from its counterpart in *Coleman*.

Most recently, the Third Circuit joined these courts in *Lesko*. There, the prosecutor belittled Lesko's offer of mitigating testimony "without even having the 'common decency to say I'm sorry for what I did.'" 925 F.2d at 1544. Petitioner made a similar offer here. As the Third Circuit explained,

> To the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him -- indeed, to apologize for his crimes -- during his penalty phase testimony, and that the jury could and should punish him for his failure to do so.

Id. This "criticism of Lesko's failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination . . . ." *Id.* at 1545.

Against this compelling legal backdrop, the prosecutor's actions at petitioner's sentencing hearing, uncorrected by the trial court, fundamentally infected the proceedings in a manner that unconstitutionally eroded the reliability of the proceedings and the resulting sentence of death. Although brief, their effect was extremely prejudicial.

> I talked with you in opening statement about a picture of a scene, picture of a scene of finding a boy, a young boy. Talked with you in closing argument to picture a scene of the defendant holding a knife to the throat of his uncle. I ask you now, my final speech to you, to picture a scene of a young boy awoke at night by his mother, nine-years old, "Robbie, our house is on fire. We've got to get of the house." Nine year old Robbin Davis in his pajamas and his mother in her pajamas on the same day that Brenda Smith laid strangled to death, had to flee from their homes [sic] and when the firemen arrived, but for the smoke detector, you would have seen volunteer firemen of the Pelham Fire Department, big strong men, crying over the death of the lifeless form of a small nine-year old child burned to death by this defendant who doesn't care.
>
> He shows no remorse. He gives no confession. He asks no repentance. He is a stone-cold killer.

[App. 9[illegible]] The reference here characterized petitioner as unremorseful because of his denial of guilt. It could be based on little else. He had, in fact, "confessed" as evidenced by the state's numerous witnesses relating various inculpatory statements. He simply had not "confessed" to the jury.

This argument encouraged the jury to aggravate petitioner's crime by considering his lack of remorse. In North Carolina, the jury may not do so as the capital sentencing scheme's enumeration of aggravating factors is all-inclusive and remorselessness is absent. *See* N.C. Gen. Stat. §15A-2000(e). The prosecutor here vigorously cross-examined petitioner at great length. A large portion of this inquiry centered on whether petitioner committed the crime. The prosecutor's argument could only have suggested to the jury that, based upon his plea of not guilty and evidence in support of that plea, petitioner showed no remorse.

Nothing meritorious can be said for the prosecutor's repeated exploitation on cross-examination and in argument to the jury of petitioner's refusal to admit guilt. It unfairly penalized his exercise of due process rights, as well as the right against self-incrimination, and deeply infected the sentencing determination. It was far more vigorous and detailed than the arguments held incurably prejudicial by the highest

courts of four different states in *Owen*, *Pope*, *Sloan*, and *Coleman*, as well as the Third Circuit in *Lesko*.

This important issue is likely to recur in capital proceedings because of the need for a separate sentencing hearing, often conducted before the same jury that determined guilt. A division exists among the jurisdictions on this question, making it appropriate for this Court's review. A grant of certiorari is in order.

CONCLUSION

For the independent reasons stated herein, petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina.

This the 29th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender
Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham North Carolina 27713
(919) 560-3282

IN THE SUPREME COURT OF NORTH CAROLINA

No. 587A87# Person County

STATE OF NORTH CAROLINA

v

RICKY LEE PRICE

Death Case

JUDGMENT

This cause came on to be argued upon remand by the United States Supreme Court for further consideration in light of Morgan v. Illinois, 501 U.S. ___ (1992).

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable John Webb, Associate Justice, be certified to the said Superior Court, Person County to the intent that the death sentence is affirmed; the mandate is reinstated and the case is remanded for the causes indicated in said opinion.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty-four and 60/100 dollars ($54.60), and execution issue therefor.

Certified to the Superior Court, Person County, this 30th day of September, 1993.

A TRUE COPY

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

By: Peggy R. Byrd
Assistant Clerk

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By Peggy R. Byrd
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App. 42

[3] Defendant lastly argues that the trial court erred by refusing to rule on defendant's motions for appropriate relief and for mistrial and dismissal prior to sentencing. Defendant contends that the trial court was required to rule on such motions prior to sentencing under N.C.G.S. § 15A-1061. The ruling, defendant argues, would have allowed defendant to decide whether to take the stand during the sentencing phase of his trial. We reject this assignment of error because defendant was not prejudiced by the trial court's failure to rule on defendant's motions prior to sentencing.

Defendant was tried capitally. After the sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment. Life imprisonment is the least severe sentence that defendant could have received for his conviction of first-degree murder. N.C.G.S. § 14-17 (Supp. 1992). Therefore, defendant's sentence could not have been reduced even if defendant had chosen to testify on his own behalf at the sentencing phase of his trial. Assuming, *arguendo*, that the trial court erred in delaying its ruling until after the sentencing proceeding, such error was not prejudicial to defendant. N.C.G.S. § 15A-1443 (1988).

We conclude defendant received a fair trial, free from prejudicial error.

NO ERROR.

STATE of North Carolina

v.

Ricky Lee PRICE.

No. 585A87.

Supreme Court of North Carolina.

Sept. 10, 1993.

Defendant was convicted before the Superior Court, Person County, Robert H. Hobgood, J., of first-degree murder and sentenced to death. On his appeal, the Supreme Court, 326 N.C. 56, 388 S.E.2d 84, affirmed. On petition for writ of certiorari, the United States Supreme Court, 498 U.S. 802, 111 S.Ct. 29, 112 L.Ed.2d 7, vacated and remanded. On remand, the Supreme Court, 331 N.C. 620, 418 S.E.2d 169, reaffirmed conviction and judgment. The United States Supreme Court again vacated and remanded, 113 S.Ct. 955. On remand, the Supreme Court, Webb, J., held that assuming it was error not to allow defense counsel to ask prospective jurors whether they would require state to prove aggravating circumstances before imposing the death penalty, error was harmless beyond a reasonable doubt, where defense counsel was allowed to ask other questions which should have enabled him to determine whether to challenge juror on ground juror would automatically vote for death penalty if defendant was found guilty.

Death sentence affirmed; mandate reinstated; remanded.

Criminal Law ⇐1166.16

Assuming it was error not to allow defense counsel on voir dire in capital case to ask prospective jurors whether they would require the state to prove aggravating circumstances before imposing the death penalty, it was harmless beyond a reasonable doubt, notwithstanding defendant's claim that he was thereby denied opportunity to determine whether jurors should be challenged because they would not require the state to prove such circumstances; defense counsel was allowed to ask other questions which should have enabled him to determine whether to challenge juror on ground that juror would automatically vote for death penalty if defendant was found guilty.

The defendant was convicted of first degree murder and sentenced to death. This Court affirmed his murder conviction and death sentence. The United States Su-

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WEBB, J

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preme Court vacated the judgment and remanded the case to us for further proceedings in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *vacated and remanded*, 498 U.S. 802, 111 S.Ct. 29, 112 L.Ed.2d 7 (1990) (*Price I*). This Court reaffirmed the conviction and judgment. The United States Supreme Court again vacated the judgment and remanded the case to us for further proceedings in light of *Morgan v. Illinois*, 504 U.S. —, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded*, — U.S. —, 113 S.Ct. 955, 122 L.Ed.2d 113 (1993) (*Price II*).

The facts of this case are summarized in *Price I* and will not be restated here except as is necessary for proper treatment of the issue to be addressed.

Michael F. Easley, Atty. Gen. by Barry S. McNeill, Sp. Deputy Atty. Gen., Raleigh, for the State.

Malcolm R. Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant.

WEBB, Justice.

This case has been remanded to us by the United States Supreme Court for further consideration in light of *Morgan v. Illinois*, 504 U.S. —, 112 S.Ct. 2222, 119 L.Ed.2d 492. In *Morgan*, the United States Supreme Court granted the defendant a new sentencing hearing because the trial court, during jury selection, would not ask the prospective jurors if they would "automatically vote to impose the death penalty no matter what the facts are[.]" *Id.* at —, 112 S.Ct. at 2226, 119 L.Ed.2d at 499. The United States Supreme Court said that the due process clause of the Fourteenth Amendment required that the defendant be allowed to have this question put to the jury in order to determine whether to exercise a challenge to any juror who answered in the affirmative. The Court said that general questions as to whether the jury "would follow the law" are not sufficient to satisfy the requirement that the defendant be allowed to make a sufficient inquiry to make an intelligent challenge.

The defendant says the rule of *Morgan* was violated by rulings of the court in this case as shown by the following colloquy:

MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?

MR. KIMBROUGH: According to the Judge's instructions, yes.

MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained.

MR. GALLOWAY: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained.

MR. GALLOWAY: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.

THE COURT: Let the record so reflect.

The defendant says that this colloquy illustrates that he was denied the opportunity to exercise his right to ask a specific question of prospective jurors in order to determine whom he should challenge because they might not be able to require the State to prove aggravating circumstances before imposing the death penalty.

Assuming it was error not to allow the questions shown above, we do not believe it was prejudicial to the defendant. He was

allowed to ask other questions which should have enabled him to determine if challenges should have been made on this ground. The court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

If the refusal to allow the excluded questions was error, it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

STATE of North Carolina

v.

Robert Archie CLEMMONS, Jr.

No. 9218SC78.

Court of Appeals of North Carolina.

Aug. 17, 1993.

Defendant was convicted in the Superior Court, Guilford County, W. Russell Duke, Jr., J., of obtaining property by false pretenses and transacting business in securities without being licensed or registered in violation of North Carolina Securities Act. Defendant appealed. The Court of Appeals, Eagles, J., held that: (1) defendant did not "transact business" within meaning of Securities Act, and (2) court was not required to instruct jury on specific misrepresentation as alleged in indictment.

Reversed and remanded in part, affirmed in part, vacated in part.

1. Securities Regulation ⇐192

Defendant did not "transact business," for purposes of section of Securities Act prohibiting unregistered persons from transacting business as dealer or salesman, where defendant misrepresented to victims that he had invested their money in stock options when, in fact, he never purchased stock options and where state's evidence showed only that defendant gave victims false impression that he was "broker" or "licensed broker"; statute prohibits transacting business without being registered, not offering to transact business without being registered. G.S. § 78A-36(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Securities Regulation ⇐195

Evidence that defendant advised victims, for 10% commission, to invest in securities of corporations and that defendant told victims that value of these securities would increase by various amounts in future, promising extravagantly large returns on their original investment, would support indictment under statute prohibiting person who receives consideration for advising another person as to value of securities or their purchase from defrauding other person, or engaging in acts that operate as fraud or deceit upon other person. G.S. § 78C-8.

3. Criminal Law ⇐814(6)
False Pretenses ⇐38

Although jury was not instructed on specific misrepresentation alleged in indictments charging obtaining property by false pretenses, there was no fatal variance between indictment, proof, and instruction, where state's evidence showed that defendant obtained property (victims' money) by false pretenses (statements that defendant was "broker" or "licensed broker" and that their money would
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4. Criminal Law ⇐
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SUPREM COURT OF THE UNITED S TES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 11, 1993

Mr. Gordon Widenhouse
PO Box 1070
Raleigh, NC 27602

Re: Ricky Lee Price
v. North Carolina
No. 92-6239

Dear Mr. Widenhouse:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of Morgan v. Illinois, 501 U. S. ------ (1992).

Very truly yours,

William K. Suter

William K. Suter, Clerk

93-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

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CERTIFICATE OF SERVICE

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 29th day of December, 1993, one copy of the Petition for Writ of Certiorari (complete with appendices), and Petitioner's Request to Proceed *In Forma Pauperis* in the above-entitled case were served on Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 29th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender
Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham, North Carolina 27713
(919) 560-3282

COUNSEL OF RECORD FOR PETITIONER